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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1934. No. 395.

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, Statutory Receiver of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION,
Petitioner,

v.

JOSEPH OMINSKY and ROBERT B. ELY, 3RD, Federal Receivers of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, and HARVEY STEIGNER and IDA V. STEIGNER, His Wife, EDITH B. GOODE, JULES SKLAR and PHILIP ZINMAN,
Respondents.

BRIEF FOR RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF FOR RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

This case comes before the Court on writ of certiorari issued to review a final decree of the Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania delivered by Judge Dickinson on July 24, 1933, is not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit, delivered by Judge Davis on July 25, 1934, is reported in 72 F. (2d) 517.

STATUTES INVOLVED.

The Federal statute involved in this proceeding and referred to in the courts below is set forth in Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 USCA Sec. 41 (1), and is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity * * * where the matter in controversy exceeds exclusive of interest and costs, the sum or value of $3,000, and * * * is between citizens of different states."

The Pennsylvania statute involved in this proceeding is "The Banking Act of 1923," of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762, 7 PS Sec. 1 et seq.

The relevant portions of the act are recited in full in the appendix to the brief for the petitioner filed with this Court in *Commonwealth of Pennsylvania, Petitioner, v. John G. Williams, et al., Receivers of Mortgage Building and Loan Association*, October Term 1934, No. 394.

STATEMENT OF THE CASE.

On March 31, 1933, a stockholder's Bill in Equity was filed in the District Court of the United States for the Eastern District of Pennsylvania on behalf of five named stockholders residing in New Jersey and all other stockholders who might wish to join in the Bill (R. 1). On the same day a motion for the appointment of receivers was filed, returnable April 21, 1933, (R. 9). On the same day the Bill and motion was duly served (R. 1).

The Bill averred (R. 2 et seq.) that the complainants' claims exceeded $7500.00, that the Christian A. Fisher Building and Loan Association, hereinafter referred to as Association, was indebted to certain preferred creditors to the extent of $200,000.00, that the Association was and had for a long time prior been hopelessly insolvent, that its capital of $1,000,000.00 had been impaired to the extent of $600,000.00, that its principal asset—mortgage loans—had depreciated approximately forty per cent, that all of its assets were in danger of being seized by the preferred creditors, that even though all of its officers were under criminal indictment for frauds committed against the Association they were still actively managing the Association, and that the respective investments of the complainants in the Association were in imminent jeopardy.

The Bill prayed, *inter alia*, for the appointment of a receiver and/or receivers (R. 7).

On April 18, 1933, the instant petitioner, being State Secretary of Banking, filed a suggestion that he had taken possession of the Association on April 8, 1933, or eight days *after* the Bill had been filed and served (R. 10). The complainants immediately filed objections to the possession of the petitioner which resulted in an agreement that the status quo be preserved pending determination by the District Court.

On the same day an Answer was filed by the petitioner

which substantially admitted all the substantive averments of the Bill (R. 10, et seq.). In addition the Answer set forth (R. 13, par. 13) that the petitioner was ignorant of the Association's hopeless insolvency, great impairment of capital and woeful condition of mortgage loans prior to the time he took possession on April 8, 1933.

After several postponements the motion for appointment of a temporary receiver came up before Judge Dickinson of the District Court. He declined to appoint a temporary receiver and suggested that the matter be set down for final disposition (R. 15). It was then agreed by counsel representing the petitioner and the complainants that the case be disposed of on Bill and Answer, which resulted in Judge Dickinson appointing the respondents permanent receivers on July 24, 1933 (R. 16).

The petitioner then appealed from the order appointing the respondents receivers to the Circuit Court of Appeals for the Tihrd Circuit who affirmed the decree of the District Court on the basis of an opinion filed simultaneously in the case of *Commonwealth of Pennsylvania v. John G. Williams, Et Al., Receivers of Mortgage Building and Loan Association,* in which case there was raised the same legal questions as in the instant case (R. 27).

On September 21, 1934, a petition for certiorari was filed, and on November 5, 1934, your Honorable Court granted a certiorari.

ARGUMENT.

Since the petitioner's argument, in the main, follows his argument on the writ of certiorari in the case of *Commonwealth of Pennsylvania v. John G. Williams, et al., Receivers of Mortgage Building and Loan Association,* we adopt the respondents' brief filed in that case as adequate answer to the question of the District Court's jurisdiction in the instant case.

There are, however, definite factual differences between the Mortgage Building and Loan case and the instant case which tend to make the instant case much stronger.

In the Mortgage Building and Loan case the petitioner contends that before the Bill was filed it was definitely exercising control over the Association, and further, that that case has in it the element of "consent decree".

Such considerations do not apply to the instant case.

In the instant case the petitioner frankly admits that rather than exercise control over the Association as he legally could have done, he had not even examined the affairs of the Association! He was totally ignorant of its financial condition even when he practically defied the District Court, and, without notice to the complainants or the Court, took possession of the Association eight days *after* the complainants had served their Bill.

There is no element of "consent decree" in the instant case. The District Court did not act until an Answer to the Bill had been filed by the petitioner, (not by an officer of the Association), and two hearings held. Counsel for the petitioner agreed that the matter be disposed of on Bill and Answer. Everything that was done by the complainants was done openly and only after ample notice to all parties concerned. It is only fair to state that two postponements were granted so that the petitioner could amend his Answer, but the petitioner chose to stand on the Answer as filed.

POINT I.

A Federal Court which has obtained jurisdiction and constructive possession of property by the filing of a Bill in Equity may not be deprived of its jurisdiction because its receivers did not obtain physical possession of the property in dispute.

Not only does the petitioner contend that the Federal

Court was deprived of its jurisdiction when he took possession of the property of the Association, but more—the Federal Court was guilty of an abuse of discretion in attempting to translate its jurisdiction into reality by appointing receivers. The petitioner bases this amazing theory on the principle of comity between two concurrent tribunals—one should not interfere with the other.

At the outset it may be pointed out that at least one of the cases the petitioner relies upon—*Ulmer v. Falmouth*, 93 Me. 302 (1899)—has been overruled *sub silentio*, by *Smith et al. v. Bath Loan and Building Association*, 126 Me. 49 (1927).

> *Philbrook, J.*, at p. 61. . . . "Except in a few jurisdictions where the statutory remedy of dissolving building and loan associations on suit brought by state officials is exclusive, and precludes the appointment of a receiver in an ordinary action in equity, it is the rule, both under statute and otherwise, that resort may be had to a court of equity for the appointment of a receiver of a building and loan association, and on the filing of a sufficient bill by the proper party, the court will appoint a receiver when it appears that it is unsafe and inexpedient to further continue the business, either because of a loss of public confidence therein, or because of its insolvency or mismanagement."

Since the purpose of the petitioner in taking possession of the Association is admittedly (Par. No's. 18, 19—Record, pp. 14, 15) the same as that for which the Bill was filed, the subject matter in litigation and the relief sought are identical.

The rule governing such a conflict of jurisdiction is familiar. In *Harkin v. Brundage*, 276 U. S. 36 (1927) your Honorable Court said:

> *Taft, C. J.*, at p. 43, "The principle which should

govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction, and constructive possession of property by filing the bill is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute. . . ."

Clearly the petitioner cannot indulge in an unseemly race with the Federal Court to acquire possession of the association. Cases to support this proposition are many. We list the following illustrations:

(1) The decree of a federal court, which first acquires jurisdiction of the subject matter and establishes a mechanic's lien, is not affected by a later proceeding in a state court in which a sale of the property and a different application of the proceeds are ordered. *McGraw v. Walsh* (W. Va. 1916) 232 F. 122, 146 C. C. A. 314.

(2) A state court may not interfere in any way with the enforcement of an order of a federal court in condemnation proceedings of which the federal court has jurisdiction, the order being executory until the object of the proceedings is accomplished. *Woods v. Root* (Illinois 1903) 123 F. 402, 59 C. C. A. 206.

(3) The jurisdiction of a federal court having attached, the right of the plaintiff to prosecute his suit in that court cannot be arrested or taken away by garnishee process against the defendant in a state court. *Mack v. Winslow* (Ky. 1893) 59 F. 316, 8 C. C. A. 134; *Deming v. Orient Ins. Co.* (C. C. Iowa, 1896) 78 F. 1.

(4) A defendant, by going into a Surrogate's Court could not defeat or impair the jurisdiction of a federal court, previously attached, or deprive the plaintiff of his

right as a citizen of another state to the cognizance of a federal court. *Brown v. Fletcher* (N. Y. 1916) 231 F. 92, 145 C. C. A. 280.

(5) A court, having gained prior jurisdiction of a cause by the service of its process, is not deprived of its jurisdiction by reason of the actual seizure of the property in controversy by the officer of a court having concurrent jurisdiction. *Owens v. Ohio Cent. R. Co.* (C. C. W. Va. 1884) 20 F. 10. The filing of a bill in equity and issuing of a subpœna, gave a federal court jurisdiction as against an action subsequently begun in a state court by a summons which was served before service of the writ of subpœna issued by the federal court. *Farmer's Loan & Trust Co. v. Lake St. El. R. Co.* (1900) 177 U. S. 51, 20 S. Ct. 564, 44 L. Ed. 667, reversing judgment (1898) 173 Ill. 439, 51 N. E. 55, writ of error dismissed *Lake St. Elevated R. Co. v. Farmers' Loan & Trust Co.* (1901) 182 U. S. 417, 21 S. Ct. 870, 45 L. Ed. 1161; *Barker v. Eastman* (N. H. 1913) 206 F. 865, 124 C. C. A. 525, affirming decree (C. C. 1911) 192 F. 659.

(6) Where bills were tendered for filing in a federal court pursuant to notice previously given, and leave was withheld out of courtesy to the defendant Attorney General, who was absent, but restraining orders were issued, based on the foregoing, the court's jurisdiction over the subject matter thus obtained was held not ousted by the institution of suits in a state court subsequently, though before the formal filing of the bills. *St. Louis & S. F. R. Co. v. Hadley* (C. C. Mo. 1907) 155 F. 220.

A situation paralleling the case at bar arose in *Employers' Reinsurance Corporation v. Boston Mutual Life Insurance Co.*, 45 F. (2d) 593 (1930). A bill for a receiv-

ership was filed in a state court but before the state court appointed a receiver, a bill was filed in the federal court which immediately appointed a receiver who took possession. On appeal it was held that the state court had first acquired jurisdiction and the federal action was dismissed, citing *Farmers' Loan and Trust Co. v. Lake Street Elevated R. R. Co.*, 177 U. S. 51, *supra.*

In *O'Neil v. Welch*, 245 Fed. 261 (1917), *after* proceedings had been commenced in a state court, the federal court appointed a receiver. On appeal, it was held that as the first proceedings were in the state court, the federal court could not appoint a receiver. The court laid down as a test—the court which first obtained jurisdiction had the right to proceed to its final determination without interference from the other.

In the case at bar, the action of the Secretary of Banking in taking physical possession of the property *after* the District Court had entertained the Bill obviously smacks of a resolve to oust that Court of its jurisdiction.

POINT II.

It is a proper exercise of power for a Federal Court to appoint receivers for a building and loan association when an answer filed on behalf of an intervening state Secretary of Banking admits he permitted the association to be operated and controlled by five officers who were under indictment for frauds in connection with the association, and that he was ignorant of its hopelessly insolvent condition prior to the time he took possession of the association.

Whether or not the District Court was guilty of an abuse of discretion in appointing receivers must of necessity depend on what was before that Court.

Now, just what does the Record show?

COMPLAINANTS' BILL.	PETITIONER'S ANSWER.
13. By reason of its present insolvent condition, which has existed for the past year and more, defendant has abandoned entirely the active conduct of its business; for more than two years has made no mortgage loans; has practically ceased making stock loans; for more than two years has made no payment of withdrawals, although it now has a withdrawal list in excess of $300,000, and the payment of dues, interest and premiums on its outstanding mortgage loans are considerably in arrears in an amount which cannot be estimated by the plaintiffs. (Record, pp. 5, 6.)	13. In reply to paragraph No. 13, respondent admits that the association at the present time is insolvent in that it is unable to pay its stockholders in full *but has no knowledge as to how long this condition existed prior to the date the Secretary of Banking took possession thereof on April 8, 1933.* It is denied however, that the association had abandoned entirely the active conduct of its business. On the contrary, it is averred that the association had functioned for some time prior to the date possession of the association was taken by respondent on a limited basis. That is to say, steps necessary to protect the assets of the association; payments were received on account of the principal and interest but no contributions were received in the way of dues. (Record, pp. 13, 14.) (Italics ours.)
16. The following officers of the defendant association and who are still in control of the association's business, have been indicted for embezzlement and misapplication of building and loan funds in the Court of Quarter Sessions of Philadelphia County, as follows:	16. Admitted with the exception that Christian A. Fisher, the president of the association, has been acquitted. (Record, p. 14.)

President—Christian A. Fisher, October Term, 1932, No. 1338-42, November Term, 1932, No. 1224-33, 51, 53, 58, 63.
Vice-President — Fred Shmidheiser, October Term, 1932, No. 1342, 47, November Term, 1932, No. 1234-49, 56, 57, 66-70.
Secretary—P. William Huster, October Term, 1932, No. 1340, 41, November Term, 1932, No. 1224-30.
Treasurer—Harry A. Rau, October Term, 1932, No. 1338-41, November Term, 1932, No. 1224-49.
Conveyancer—George A. Nahm, October Term, 1932, No. 1343-47, November Term, 1932, No. 1234-36, 50-55, 61-64, 69, 70. (Record, p. 6.)

On these pleadings how could the District Court refuse to appoint receivers?

CONCLUSION.

It is therefore submitted that the decree of the court below should be affirmed.

Respectfully submitted,

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